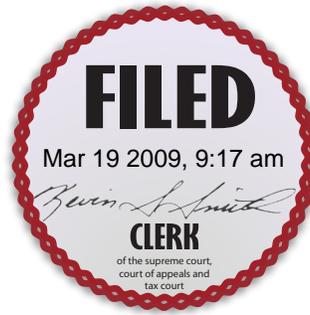


**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



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**IN THE  
COURT OF APPEALS OF INDIANA**

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RANDALL WEST and LINDA WEST, )

Appellants-Defendants, )

vs. )

No. 49A02-0806-CV-485 )

THEODORE (BUCK) RETMIER and )  
CATHERINE (CATHY) RETMIER, )

Appellees-Plaintiffs. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Cynthia J. Ayers, Judge  
Cause No. 49D04-0308-PL-1398

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**March 19, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Appellants-Defendants/Counterclaimants Randall and Linda West appeal the judgment in favor of Appellees-Plaintiffs Theodore and Catherine Retmier regarding the termination of a purchase agreement for a home and return of earnest money. We affirm.

## **Issues**

The Wests raise three issues on appeal:

- I. Whether the trial court's conclusion that the Retmiers had not repudiated and breached the contract because they made a good faith effort to obtain financing was clearly erroneous;
- II. Whether the trial court erred in concluding that the Wests breached the purchase agreement by failing to execute a mutual release agreement and return the earnest money; and
- III. Whether the trial court erred by awarding attorney's fees to the Retmiers.

## **Facts and Procedural History**

After entering into a contract to sell their home on May 24, 2003, the Retmiers expressed interest in purchasing the Wests's home. At some point, the Retmiers met with a representative from Colony Mortgage regarding mortgage financing. The Retmiers indicated that they intended to make a joint application. After the Colony representative ran a credit check, he did not provide the Retmiers with an application. The Retmiers then contacted their current mortgage company, Aames Home Loan, seeking to obtain a joint mortgage to purchase the Wests's home ("the Home"). During that same time, the Retmiers made an offer to purchase the Home, and after subsequent counteroffers, the Retmiers requested a pre-approval letter from Aames. The Retmiers received a "Pre qualification Certificate,"

addressed to Mr. and Mrs. Retmier, for a \$160,650 loan at the loan to value ratio of eighty-five percent.<sup>1</sup>

On June 5, 2003, the Wests accepted the Retmiers's counteroffer to sell the Home for \$190,000. The Retmiers had already submitted an earnest money check for \$1500 and subsequently provided the Prequalification Certificate to the Wests. The purchase agreement between the parties provided that the Retmiers would obtain a new mortgage for 90% of the purchase price that is payable in not less than 30 years. As to the earnest money, the purchase agreement provided:

Buyer submits \$1500 as earnest money which shall be applied to the purchase price. The listing broker shall deposit the earnest money into its escrow account within two (2) banking days of acceptance of this Agreement and hold it until time of closing the transaction or termination of this Agreement. . . . If this offer is accepted and Buyer fails or refuses to close the transaction, without legal cause, the earnest money shall be forfeited by Buyer to Seller as liquidated damages, and Seller may pursue any other legal and equitable remedies. The Broker holding any earnest money is absolved from any responsibility to make payment to the Seller or Buyer unless the parties enter into a Mutual Release or a Court issues an Order for payment. ....

Plaintiff's Exhibit 1. The agreement also provided that the closing would be on June 27, 2003, "or 3 days after mortgage approval, whichever is later or this Agreement shall terminate unless an extension of time is mutually agreed to in writing." Id. The agreement also provided that:

Buyer agrees to make written application for any financing necessary to complete this transaction or for approval to assume the unpaid balance of the existing mortgage within 7 days after the acceptance of this Agreement and to make a diligent effort to meet the lender's requirements and to obtain financing in cooperation with the Broker or Seller. No more than 26 days after

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<sup>1</sup> Based on these terms, the value of the home could be up to \$189,000 ( $\$160,650 \div .85$ ).

acceptance of the Agreement shall be allowed for obtaining favorable written commitment(s) or mortgage assumption approval. If a commitment or approval is not obtained within the time specified above, this Agreement shall terminate unless an extension of time for this purpose is mutually agreed to in writing.

Id.

On June 11, 2003, Catherine Retmier faxed additional information to Aames, including pay stubs, tax returns and W-2 forms for both herself and her husband. Catherine received a form from Aames, which she completed, including basic information regarding her and her husband. There was also a form, signed by both of the Retmiers, authorizing Aames to obtain information to verify their loan application. On June 24, Aames faxed two statements of credit denial addressed to Catherine. Both documents indicated that the denial was based on “Delinquent Past or Present Credit Obligations with Others.” Plaintiff’s Exs. 7, 8.

After discussing their rejection by two loan companies, the Retmiers contacted their real estate agent, sent her a copy of one of the denial letters and informed her that it would not be possible to obtain the necessary financing by the July 1 deadline. The Retmiers’s real estate agent filled out a Mutual Release form, which the Retmiers subsequently signed. The Retmiers’s real estate agent then sent the form to the Wests’s real estate agent on June 25, along with a copy of one of the credit denial letters. The Release provided that the Purchase Agreement would be rescinded and that the earnest money would be returned to the Retmiers.

The next day the Wests responded with the following faxed statement:

Purchase agreement for the property known as 5505 Ashurst Street requires buyer, by agreement to make written application for “any” financing necessary to complete transaction. In addition, buyer agrees to make “a diligent effort to meet lenders requirements and to obtain financing in cooperation with the broker and seller.”

Seller requires cooperation of buyer per purchase agreement, in contacting Marlene Scheetz, RBC Mortgage . . . by the close of business June 26, 2003. In the event, mortgage cannot be obtained through RBC Mortgage, earnest money will be returned to buyer. If buyer refuses to contact RBC Mortgage, seller sees no legal cause for buyer refusing to close the transaction and earnest money shall be forfeited to seller. Seller may seek any and all liquidated damages as a result of the failure of buyers to proceed with the purchase of said property located at 5505 Ashurst Street Indianapolis, IN 46220.

The Retmiers responded in writing that they would not make additional attempts to obtain financing due to past rejections. The letter also demanded the return of the earnest money and threatened to file a lawsuit for its return.

On April 26, 2004, the Retmiers filed their amended complaint, seeking the return of their earnest money. The complaint also sought attorney’s fees and court costs associated with the action. After a bench trial, the trial court held that the Retmiers’s ability to obtain financing was a condition precedent to the contract and that their actions constituted a reasonable, good faith effort to obtain financing. The trial court also concluded that the demand by the Wests that the Retmiers seek financing through a specific broker three days prior to the financing deadline was unreasonable. Upon the Retmiers fulfilling their legal obligations to attempt to acquire financing, the Wests had a duty to execute the mutual release for the return of the earnest money. In failing to release the funds, the trial court concluded that the Wests breached their contractual duty. The trial court ordered judgment in favor of the Retmiers for the amount of the earnest money and for reasonable attorney’s fees,

pursuant to the purchase agreement.

The Wests now appeal.

## **Discussion and Decision**

### Standard of Review

The trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A). Therefore, our standard of review is two-tiered: we first determine whether the evidence supports the trial court's findings, and second, we determine whether the findings support the judgment. Purcell v. Southern Hills Invs., LLC, 847 N.E.2d 991, 996 (Ind. Ct. App. 2006). Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them, and the trial court's judgment is clearly erroneous if it is unsupported by the findings and the conclusions that rely upon those findings. Id. In determining whether the findings or the judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom. Id.

In conducting our review, we cannot reweigh the evidence or judge the credibility of any witness, and must affirm the trial court's decision if the record contains any supporting evidence or inferences. Id. However, while we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We evaluate questions of law, such as interpretation of contractual provisions, *de novo* and owe no deference to a trial court's determination of such questions. Id.

### I. Reasonable, Good Faith Effort

The Wests challenge the trial court's conclusion that the Retmiers did not repudiate the contract because they made a reasonable, good faith effort to obtain financing. "When a real estate purchase agreement is conditioned on the purchaser obtaining financing, the purchaser has the implied obligation to make a reasonable and good faith effort to satisfy such a condition." Beck v. Mason, 580 N.E.2d 290, 292 (Ind. Ct. App. 1991). "A good faith effort is defined as what a reasonable person would determine is a diligent and honest effort under the same set of facts or circumstances." Hamlin v. Steward, 622 N.E.2d 535, 540 (Ind. Ct. App. 1993).

The findings support the conclusion that the Retmiers made a reasonable and good faith effort to obtain financing. They first inquired with Colony Mortgage, but were not even furnished an application after the company ran a credit report. When the Retmiers turned to their current mortgage company, Aames, Aames issued a Prequalification Certificate on June 5, 2003, addressed to both of the Retmiers. After Catherine submitted the requested financial information for both her and her husband, the Retmiers received two denial of credit letters, addressed to Catherine, which noted the basis of the denial as delinquent credit obligations. No admissible evidence<sup>2</sup> was presented that the Retmiers were ever approved for a loan to purchase the Home or took any steps to sabotage the approval process. Therefore, the evidence and the findings support the conclusion that the Retmiers made a reasonable and

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<sup>2</sup> The Wests allege that the Retmiers withdrew their joint application and subsequently submitted two loan applications solely in Catherine's name. However, no evidence was admitted to support this theory.

good faith effort to obtaining financing.

The Wests also challenge the conclusion that their demand that the Retmiers contact a specified mortgage broker was unreasonable. The Wests argue that the Cooperation Clause (“to make a diligent effort to meet the lender’s requirements and to obtain financing in cooperation with the Broker or Seller”) from the purchase agreement required the Retmiers to cooperate with their demand to contact the suggested mortgage broker. However, a cooperation clause does not give a party to the contract the right to demand any act of the other party in the name of cooperation to complete the contract. Rather, a cooperation clause implies that the parties must cooperate with reasonable requests in order to complete the contract. Here, three business days before the financing had to be complete, the Wests demanded that the Retmiers contact a specific company to obtain financing by the end of the next business day. West’s expert testified that it would normally take approximately eight business days to complete the financing from the intake of information to closing. As neither party requested an extension of time, the financing could not be completed by the intended closing date. Thus, this request was unreasonable.

Because the Retmiers made a reasonable and good faith effort to obtain financing by July 1, 2003, the deadline in the purchase agreement, and no extension of time was agreed upon, the purchase agreement terminated by its terms. See Barrington Mgmt. Co. v. Paul E. Draper Family Ltd. P’ship, 695 N.E.2d 135, 141 (Ind. Ct. App. 1998) (“When a written agreement to convey real property makes time of the essence, fixes a termination date, and there is no conduct giving rise to estoppel or waiver, the agreement becomes legally defunct

upon the stated termination date if performance is not tendered.”), trans. denied.

## II. Breach of Contract

Next, the Wests contend that the trial court erred by concluding that they breached the purchase agreement by failing to sign the Mutual Release form and return the earnest money to the Retmiers. The trial court concluded that: “Once the Retmiers fulfilled their legal obligations to try to obtain financing commitment and failed to do so by July 1, 2003, the Wests had a duty to execute the mutual release so that the escrowed funds could be returned to the Retmiers. . . . The Wests breached their contractual duty to release the escrowed funds.” Appellant’s App. at 21-22.

By its own terms, the contract terminated upon the failure of the condition precedent (the Retmiers obtaining financing) and the condition subsequent (the passing of the deadline to close on the transaction). See Id. at 142. While it may be a customary method of recognizing the termination of a purchase agreement, no term of the purchase agreement required the parties to sign a Mutual Release upon termination. The only term that came into play was whether the Wests were required to return the earnest money. The purchase agreement provides: “If this offer is accepted and Buyer fails or refuses to close the transaction, without legal cause, the earnest money shall be forfeited by the Buyer to Seller as liquidated damages[.]” Appellant’s App. at 27. Here, there is no dispute that the Retmiers failed to close the transaction. Rather, they disagree as to whether the failure was without legal cause, and therefore, whether the Wests were entitled to the earnest money as liquidated damages.

As we previously stated, the Retmiers made a reasonable and good faith effort to obtain financing without success. Thus, there was a legal cause for their failure to close. Once the financing failed and the termination date passed, the Wests were not entitled to retain the earnest money. Barrington Mgmt., 695 N.E.2d at 142. Therefore, as ordered by the trial court, the Wests are required to return the \$1500 earnest money to the Retmiers.

### III. Attorney's Fees<sup>3</sup>

Finally, the Wests challenge the award of attorney's fees and costs to the Retmiers. Based on the attorney's fees provision in the purchase agreement, the trial court ordered that the Retmiers were entitled to recover costs and reasonable attorney's fees from the Wests. The attorney's fees provision provided that "[a]ny party to this Agreement who is the prevailing party in any legal or equitable proceeding against any other party brought under or with relation to the Agreement or transaction shall be additionally entitled to recover court costs and reasonable attorney's fees from the non-prevailing party." Appellants' App. at 30.

Indiana follows the American Rule that requires each party to pay their own attorney's fees absent an agreement or statutory authority to the contrary. AGS Capital Corp. v. Product Action Intern., LLC, 884 N.E.2d 294, 316 (Ind. Ct. App. 2008), trans. denied. "A contract that allows for the recovery of reasonable attorney fees will be enforced according to its terms unless it is violative of public policy. The policy of the law generally is to discourage

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<sup>3</sup> Although the Wests phrase this argument as the trial court erring when it reinstated the Retmiers' claim for attorney's fees, the substance of their argument only addresses whether the Retmiers could recover the attorney's fees under the purchase agreement and not the procedural history of the claim. We therefore only address the argument presented.

litigation and encourage the negotiation of settlement of disputes.” Barrington Mgmt., 695 N.E.2d at 142-43.

Citing Barrington Management, the Wests contend that the Retmiers are not entitled to attorney’s fees because the Retmiers initiated a suit to rescind the purchase agreement and therefore cannot also recover attorney’s fees. However, the facts at hand are distinguishable. In Barrington Management, Paul Draper and the Paul E. Draper Family LTD Partnership (“Seller”) agreed to sell certain real estate to Barrington Management Company (“Buyer”). Id. at 138. The purchase agreement provided that the closing would occur within thirty days after all conditions to the sale had been satisfied or waived. The agreement also specified that time was of the essence. After one extension of time for the Buyer to complete certain necessary approvals, the Buyer remained unable to obtain the approvals by the modified deadline. The Buyer demanded that the Seller close on the transaction. However, the Seller refused and initiated litigation seeking rescission of the purchase agreement. Id. at 138-39.

On appeal, this Court held that once the deadline had passed for closing and the Buyer had still not obtained the necessary permits, the purchase agreement had become legally defunct according to its own terms. Id. at 142. Based on the termination of the agreement due to the Buyer’s default, the Seller was entitled to rescission. However, this Court noted that it may have been unnecessary for the Seller to initiate litigation for rescission because the contract was already legally defunct. Essentially, the relief sought by the Seller was a declaration that they had no contractual obligation to perform a provision of the contract that had already been accomplished by the automatic termination of the purchase agreement.

Here, the Retmiers do not seek rescission of the contract but the return of their earnest money. After the Wests refused to return it, the only way the Retmiers could recover the funds was by filing a lawsuit. Therefore, enforcing the attorney's fees provision does not violate public policy by encouraging unnecessary litigation. The trial court did not err in ordering the Wests to pay the reasonable attorney's fees of the Retmiers.

### **Conclusion**

In sum, the trial court's conclusion that the Retmiers made a reasonable and good faith effort to obtain financing is not clearly erroneous. Because the Retmiers filled this obligation, they had legal cause to not close on the transaction and were entitled to the return of their earnest money. Finally, the trial court's award of attorney's fees to the Retmiers was not erroneous as such relief was agreed to by the contracting parties and enforcing this provision does not violate public policy.

Affirmed.

MATHIAS, J., and BARNES, J., concur.